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11 USA Capital First Trust Deed Fund, LLC*

12 **UNITED STATES BANKRUPTCY COURT
13 DISTRICT OF NEVADA**

14 In re: 15 USA COMMERCIAL MORTGAGE COMPANY 16 Debtor) BK-S-06-10725-LBR 17) Chapter 11 18) 19 In re: 20 USA CAPITAL REALTY ADVISORS, LLC, 21 Debtor) BK-S-06-10726-LBR 22) Chapter 11 23) 24 In re: 25 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, 26 Debtor) BK-S-06-10727-LBR 27) Chapter 11 28) 14 In re: 15 USA CAPITAL FIRST TRUST DEED FUND, LLC, 16 Debtor.) BK-S-06-10728-LBR 17) Chapter 11 18) 19 In re: 20 USA SECURITIES, LLC, 21 Debtor.) BK-S-06-10729-LBR 22) Chapter 11 23) 24 Affects) OST REQUESTED FOR: 25 <input type="checkbox"/> All Debtors 26 <input type="checkbox"/> USA Commercial Mortgage Co. 27 <input type="checkbox"/> USA Securities, LLC 28 <input type="checkbox"/> USA Capital Realty Advisors, LLC 14 <input type="checkbox"/> USA Capital Diversified Trust Deed 15 <input checked="" type="checkbox"/> USA First Trust Deed Fund, LLC) DATE: February 15, 2007 16) TIME: 9:30 a.m.
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17 **MOTION BY THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA
18 CAPITAL FIRST TRUST DEED FUND LLC TO ESTIMATE AN ADEQUATE RESERVE
19 FOR UNLIQUIDATED AND DISPUTED CLAIMS IN ORDER TO PERMIT FURTHER
20 DISTRIBUTIONS TO FTDF MEMBERS**

The Official Committee of Equity Security Holders of USA Capital First Trust Deed Fund, LLC (the “FTDF Committee”) appointed in the above-captioned bankruptcy cases (the “Chapter 11 Cases”) hereby files its Motion to Estimate an Adequate Reserve for Unliquidated and Disputed Claims in Order to Permit Further Distributions to FTDF Members (the “Motion”).

This Motion is made and based on the pleadings, papers and records on file in the Chapter 11 Cases, the exhibits and Points and Authorities attached hereto, and any evidence and oral argument to be presented at the time of the hearing of Motion.

DATED this 2 day of February, 2007.

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1 **POINTS AND AUTHORITIES**

2 **I.**

3 **BACKGROUND**

4 On April 13, 2006, petitions for relief under Chapter 11 of the Bankruptcy Code were
 5 filed by the following entities (collectively, the "Debtors"):

6 USA Commercial Mortgage Company ("USACMC")

7 USA Capital Realty Advisors, LLC ("USA Realty")

8 USA Capital Diversified Trust Deed Fund ("Diversified")

9 USA Capital First Trust Deed Fund, LLC ("FTDF")

10 USA Securities, LLC ("USA Securities")

12 USACMC was in the business of brokering and servicing loans (the "Loans") on
 13 behalf of certain lenders (the "Lenders"). The Lenders who have acquired interests in loans
 14 brokered and serviced by USACMC include both individual Lenders ("Direct Lenders"), and
 15 the two funds, FTDF and Diversified (collectively, the "Funds"). The Funds, in turn, are
 16 owned by a group of individual members (the "Members," and each, a "Member") who have
 17 acquired interests in the Funds in the form of units ("Interests"). These Members represent
 18 the respective constituencies of the two Fund Committees.

20 The majority of both the Members and Direct Lenders are individuals who have
 21 invested their savings in the Loans, and who, up until the bankruptcy, relied upon the income
 22 generated by the Loans.

24 Recognizing that the Members and Direct Lenders were counting upon the regular
 25 distributions from the Debtors, on August 24, 2006, the Court entered an
 26 Order...Granting...Debtors' Motion to Distribute Funds (Docket # 1184), and subsequently,
 27 on October 2, 2006, a Modified Order Authorizing Interim Distributions and Holdbacks

1 (Docket # 1424; collectively, the "Distribution Order"). There is currently a gross amount in
 2 excess of \$10 million held by FTDF from loan collections.

3 The Distribution Order established procedures for making interim distributions to both
 4 Members and Direct Lenders throughout the pendency of the bankruptcy cases. Pursuant to
 5 the Distribution Order, monthly distributions were to be made by USACMC to FTDF, which,
 6 in turn was:

7 authorized, after establishing a reserve that the FTD Fund and
 8 the FTD Fund Committee deem to be sufficient to pay all
 9 accrued administrative expenses through the end of the subject
 10 month and all scheduled or asserted unsecured claims, to
 11 distribute remaining available funds to Fund Members of the
 FTD Fund.

12 Distribution Order, Docket #1424, ¶ 5.

13 Additionally, on January 9, 2007, the Court entered its order confirming the Debtors'
 14 Third Amended Joint Chapter 11 Plan of Reorganization (the "Plan") as amended therein.
 15 Pursuant to Section VII(B) of the Plan, following the occurrence of the Effective Date:

16 Prior to making any distribution on Allowed Claims and Equity
 17 Interests, the Post-Effective Date Entities..., the FTDF
 18 Committee (to the extent it is still in existence) or FTDF (for the
 19 benefit of and on behalf of the FTDF Estate), ...shall establish a
 20 Cash reserve for each Disputed Claim and Equity Interest,
 21 including unclassified Claims. Except as provided below, the
 22 Cash reserve for a Disputed Claim or Equity Interest shall be
 23 equal the amount set forth in the proof of Claim or Equity
 Interest, or if no proof of Claim or Equity Interest has been
 Filed, the amount set forth for the Claim or Equity Interest on
 the Schedules.

24 In connection with such distributions, FTDF is establishing reserves for all scheduled
 25 or filed claims, as well as accrued administrative claims. The Court has sustained objections
 26 interposed by the FTDF Committee to many of the claims originally filed against FTDF.

1 However, there remain many claims for which objections have not yet been filed¹ and that
 2 remain unliquidated, as well as three claims (the "Kantor Claims") which are the subject of
 3 objection set for continued hearing on March 1, 2007 (collectively the "Unliquidated
 4 Claims"). A detailed listing of the Unliquidated Claims is attached hereto as **Exhibit "1"**, and
 5 is incorporated herein by reference. Exhibit 1 also sets forth FTDF's analysis of the basis of
 6 each Unliquidated Claim, and the amount requested to be set as reserve.
 7

8 Claims 89, 90, 91, 96 and 97 appear to be equity interests in FTDF; Movant requests
 9 that such Claimants participate as equity holders pro rata with all FTDF investors in future
 10 distributions, but that the additional reserve for the asserted creditors' claims be set at \$1.00.
 11 Claims 123 and 124 are for monies invested in DTDF alleging a common enterprise among
 12 the Debtors. As such claims were released by the Confirmed Plan, Movants request that the
 13 reserve amount for theses claims be set at \$1.00. Claims 127, 128, 129, 136 and 137 are
 14 duplicate claims and Movant requests that the reserve amount be set at zero. Claims 146 and
 15 147 appear to relate to Direct Lenders, and Movants request that the reserve amount on these
 16 claims be set at \$1.00.
 17

18 The FTDF Members have not received an interim distribution since September, 2006.
 19 Pursuant to the Distribution Order, distributions to FTDF Members were to have been made
 20 on a monthly basis. However, FTDF has not been able to determine the appropriate reserve
 21 due to the existence of Unliquidated Claims which have yet to be either liquidated or
 22 disallowed. As a result, FTDF has been unable to make the monthly distributions to its
 23 Members.
 24

25
 26
 27
 28 ¹ An omnibus claims objection on full notice will be filed separately.

1 Therefore, for the reasons stated above as well as the legal authority cited below, the
 2 FTDF Committee requests that this Court estimate a sufficient reserve for any remaining
 3 Unliquidated Claims, in the amount set forth in Exhibit 1 hereto, such that FTDF will be
 4 permitted reserve distributions to its Members.
 5

6 **II.**

7 **LEGAL ARGUMENT**

8 **A. The Court Should Estimate Unliquidated and Disputed Claims to Prevent
 Undue Delay to the Administration of the Case**

9 Section 502(c)(1) of the Bankruptcy Code provides that “[t]here shall be estimated for
 10 the purpose of allowance under this section...any contingent or unliquidated claim, the fixing
 11 of which, as the case may be, would unduly delay the administration of the case.”
 12

13 With respect to effectuating the terms of Chapter 11 plan of reorganization in
 14 particular, “[p]ursuant to § 1142 of the title 11 of the United States Code...the Reorganized
 15 Debtors are directed to ‘carry out the plan.’ Section 1142 of the Bankruptcy Code also
 16 authorizes the court to ‘direct the debtor and any other necessary party ... to perform any ... act
 17 ... that is necessary for the consummation of the plan.’” In re Enron Corp., 2006 WL 544463,
 18 2 (S.D.N.Y. 2006).

19 Moreover, it has been noted that because a deferral of a
 20 distribution affects the efficient administration of a case, the
 21 possibility of such deferral provides a justification for
 22 estimation of a claim. See Mirant Corp., et al., Case No. 03-
 23 46590, Memorandum Order, p. 6 (Bankr. N.D. Tex. 2004).
 24 Thus, a meaningful distribution to those creditors who hold
 Allowed Claim is certainly a factor that the Court must
 consider.

25 Id. at 7. See also In re Adelphia Solutions, Inc., 341 B.R. 415, 423 (Bankr. S.D.N.Y. 2003)
 26 (“estimation of [Debtor’s] administrative claims...is necessary and appropriate, because, in
 27 the absence of estimation, “the fixing or liquidation of” those claims “would unduly delay the
 28

1 administration of the case.” [Debtor] is unable to establish a cash reserve in an amount that
 2 approaches what is anticipated to be the asserted aggregate amount of [Debtor’s]
 3 administrative claims. Estimation thus is an essential prerequisite to confirmation of the
 4 Plan.” Internal citations omitted).

5 As did the debtors which were granted relief in Enron, the FTDF Committee similarly
 6 maintains that the relief sought in this Motion “is necessary to allow [it] to comply with the
 7 Plan [and Distribution Order] provisions relating to periodic distributions to the holders of
 8 allowed claims.” Enron, 2006 WL 544463 at 3. Similar to the debtors in Enron, the FTDF
 9 Committee is “currently maintaining a reserve for [Unliquidated Claims] that has no
 10 correlation to any assessment of an actual amount for which they may ultimately be deemed
 11 liable.” Id. Finally, as the Enron debtors argued, “maintaining such a high reserve works a
 12 hardship on [the FTDF Members] who expect that they will be provided with a meaningful
 13 distribution at the next scheduled distribution.” Id.

14 Accordingly, the FTDF Committee respectfully requests that the Court estimate a
 15 sufficient reserve for the Unliquidated Claims referenced in this Motion.

16 B. **The Court is Granted Broad Discretion in Estimating Claims**

17 “A court has broad discretion when estimating the value of an unliquidated claim.” In
 18 re Corey, 892 F.2d 829, 834 (9th Cir. 1989). Additionally:

19 Since the Bankruptcy Code and the Bankruptcy Rules are silent
 20 on the manner in which claims are to be estimated, bankruptcy
 21 judges are to use “whatever method is best suited to the
 22 particular contingencies at issue.... [W]here there is sufficient
 23 evidence on which to base a reasonable estimate of the claim,
 24 the bankruptcy judge should determine the value.” Bittner v.
 25 Borne Chemical Co., Inc., 691 F.2d 134, 135 (3d Cir.1982).

26 In re Handy & Harman Refining Group, Inc., 262 B.R. 211, 215 (Bankr. D. Conn. 2001).

1 In this case, the FTDF Committee respectfully requests that the Court estimate a
 2 reserve for the Unliquidated Claims in the manner proposed in Exhibit 1 hereto.

3 **C. The Existence of the Remaining Asset Base Protects the Unliquidated**
 4 **Claim Creditors Pending Final Distribution**

5 Establishing a reserve for the Unliquidated Claims in the amount requested in Exhibit
 6 1 would in no way prejudice the rights of the claimants.

7 The FTDF Committee is optimistic that the pending sale of FTDF's loan portfolio to
 8 Compass Partners, LLC (the "Sale") will yet close in a timely fashion. If the sale closes,
 9 FTDF will be receiving an infusion of cash in excess of \$36.5 million. Should the Court
 10 ultimately determine that the value of the Unliquidated Claims exceeds the amount set forth in
 11 Exhibit 1 hereto, the proceeds from the Sale will be more than sufficient to pay such claims.

12 If the Sale does *not* close, then FTDF will remain the owner of a loan portfolio with
 13 loan balances which, in the aggregate, exceed \$49 million. The income that these loans can
 14 be expected to generate will be more than adequate to satisfy any of the Unliquidated Claims
 15 that may ultimately be liquidated and allowed against the FTDF estate.

16 Thus, there is no harm to the claimants of the Unliquidated Claims in setting a reserve
 17 in the amount proposed in Exhibit 1 until such time as the FTDF Committee's various claims
 18 objections are ultimately resolved. Moreover, the FTDF Committee recognizes that, if
 19 necessary, the Court may, at the hearing on March 31, 2007, revisit the issue or amount of the
 20 reserve against Effective Date distribution as to any Unliquidated Claim that is not resolved or
 21 liquidated at that hearing.

22 ///

23 ///

1 III.
2

3 **CONCLUSION**
4

5 For the reasons stated above, the FTD Committee respectfully requests that the Court
6 estimate the amounts of the remaining Unliquidated Claims for the purpose of establishing a
7 sufficient reserve to permit FTDF to make further distribution to FTDF its Members, in the
8 amounts set forth in Exhibit 1 hereto.

9 DATED this 21 day of February, 2007.
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EXHIBIT “1”

Claim No	Claimant	Claim amount	Type	Description	Equity Amount	Reserve	Comments	
89	William M. Spangler	\$20,000.00	Secured	Equity interest	\$20,000.00	\$1	In addition to reserve as general claim; claimant to participate in investor distributions based on equity interest	
90	William M. Spangler Jean A Spangler	\$100,000.00	Secured	Equity interest (plus damages)	\$100,000.00	\$1	In addition to reserve as general claim; claimant to participate in investor distributions based on equity interest	
91	Jean A Spangler	\$10,678.50	Secured	Equity interest (plus damages)	\$10,678.50	\$1	In addition to reserve as general claim; claimant to participate in investor distributions based on equity interest	
96	OVCA Associates Inc Defined Pension Plan	c/o William J Ovca Jr Trustee	\$17,957.79	Secured	Equity interest (plus damages)	\$17,267.00	\$1	In addition to reserve as general claim; claimant to participate in investor distributions based on equity interest
97	First Saving Bank c/f Gail Hodes IRA Kantor Neurology Consultants, Ltd.	\$35,143.89	Secured	Equity interest (plus damages)	\$33,792.00	\$1	In addition to reserve as general claim; claimant to participate in investor distributions based on equity interest	
123	401(k) PSP, Gray	c/o Michael W. Schmal,	Unliquidated	Unsecured	Joint and Several Liability	\$1	Investment is in DTDF	
124	Dr. Gary Kantor	c/o Michael M. Schmal,	Unliquidated	Unsecured	Joint and Several Liability	\$1	Investment is in DTDF	
125	Lynn M. Kantor	Attorney	Unliquidated	Unsecured	Joint and Several Liability	\$1	Investment is in DTDF	
127	William M. Spangler		\$20,000.00	Secured	Equity interest	Duplicate	\$0 Duplicative of Claim 89	
128	Jean A. Spangler		\$10,678.50	Secured	Equity interest	Duplicate	\$0 Duplicative of Claim 90	
129	William M. Spangler		\$20,000.00	Secured	Equity interest	Duplicate	\$0 Duplicative of Claim 91	
136	OVCA Associates Inc Defined Pension Plan	c/o William J Ovca Jr Trustee	See attachment to claim	Unsecured	Equity interest (plus damages)	Duplicate	\$0 Duplicative of Claim 96	
137	First Savings Bank c/f Gail Hodes IRA	Servicing Agent Daniel Rand	See attachment to claim	Unsecured	Equity interest (plus damages)	Duplicate	\$0 Duplicative of Claim 97	
146	Haiseth Family Trust Totally Restated 4/27/00	Sandra K Haiseth, Trustees	See attached	Secured and Unsecured	Direct Lender claim based on Bank's direct lending of all monies to individual trust funds	\$1	No claim against FTDF	
147	Katrine Mirzaian		344,011.56	Secured	Direct Lender claim based on Bank's direct lending of all monies to individual trust funds	\$1	No claim against FTDF	